

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LADDA KEOVILAY)	
Claimant)	
VS.)	
)	
KAMAN AEROSTRUCTURES)	Docket No. 1,046,547
n/k/a PLASTIC FABRICATING COMPANY, INC. ¹)	
Respondent)	
AND)	
)	
TRAVELERS INDEMNITY COMPANY OF AMERICA)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier appealed the November 22, 2011, review and modification Award entered by Administrative Law Judge (ALJ) John D. Clark. The Workers Compensation Board heard oral argument on March 16, 2012, in Wichita, Kansas.

APPEARANCES

Garry L. Howard of Wichita, Kansas, appeared for claimant. William L. Townsley, III, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the review and modification Award.

¹ Some of the pleadings in this claim show Kaman Aerostructures and Plastic Fabricating Company, Inc., as respondent.

ISSUES

Claimant filed an Application for Review and Modification with the Division of Workers Compensation on November 4, 2010. In the November 22, 2011, review and modification Award, ALJ Clark determined claimant was entitled to a modification of her August 9, 2010, settlement. The ALJ found claimant was entitled to a 62% work disability (based upon a 24% task loss and a 100% wage loss) effective September 20, 2010, which is the day after claimant was laid off from respondent's employ.

Respondent contends that claimant's motion for review and modification should be denied as it argues claimant is barred from recovering a work disability award. It also argues that claimant is not entitled to a work disability award as claimant has demonstrated she is capable of earning the same wage she was earning at the time of the work-related accident. In support of the latter argument, respondent points to the plain reading of statutes pursuant to *Bergstrom*² and the following language of the review and modification statute, K.S.A. 44-528: ". . . is earning or is capable of earning the same or higher wages than the employee did at the time of the accident." Respondent also maintains that claimant did not lose the ability to perform any job tasks she performed in her work for respondent. Respondent requests the Board reverse ALJ Clark's review and modification Award.

Claimant requests the Board affirm the review and modification Award. Claimant argues K.S.A. 44-510e controls over the general language of K.S.A. 44-528 and points to *Serratos*³ in support of her assertion that she is entitled to modification of the August 9, 2010, settlement.

The issues before the Board on this appeal are:

1. Is claimant barred by K.S.A. 44-528 from seeking a review and modification?
2. Did claimant prove by a preponderance of the evidence that she sustained a permanent partial impairment?
3. If so, did the ALJ err by awarding claimant a 24% task loss?

FINDINGS OF FACT

After reviewing the record and considering the parties' arguments, the Board finds:

² *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676 (2009).

³ *Serratos v. Cessna Aircraft Company*, 2011 WL 2637449, Kansas Court of Appeals unpublished opinion filed July 1, 2011 (No. 104,106).

Claimant suffered low back and left leg injuries on April 13, 2009, while working for respondent. The claim was settled in a running award on August 9, 2010, for the sum of \$7,400.72, all of which was due and owing at the time of the settlement. The settlement was roughly based by splitting the opinions of Dr. Michael H. Munhall, who gave claimant a 9% permanent impairment to the body as a whole, and Dr. Amitabh Goel, who opined that claimant did not suffer a work-related permanent impairment.

At the settlement hearing, the Special ALJ stated in part:

I am going to the [sic] order the insurance carrier to pay the claimant \$7,400.72. Upon the payment of that amount, it will represent a redemption of the employer and its insurance carrier's liability as it relates to the issue of the present nature and extent of the claimant's disability and only that issue.⁴

A Form D was never filed. Claimant, in her submission letter to the ALJ and in her brief to the Board, did not argue the issue of whether claimant had a permanent partial impairment was *res judicata*. Nor did the settlement transcript indicate the parties made any stipulations that claimant had a permanent partial impairment.

On September 19, 2010, claimant was discharged from her job by respondent because her job was eliminated. Claimant filed her Application for Review and Modification on November 4, 2010.

On January 12, 2011, a prehearing settlement conference was held and on the same date, the ALJ issued an Order appointing Dr. Terrence Pratt, a physical medicine and rehabilitation specialist, to perform an independent medical examination of claimant. On March 15, 2011, Dr. Pratt examined claimant and issued an independent medical evaluation report. He also reviewed medical records, including those from Dr. Romeo Smith, Drs. Goel and Munhall, Advanced Physical Therapy and a CD of a June 26, 2009, lumbar MRI. Dr. Pratt's impression was that claimant had low back pain and a history of degenerative disk disease. He stated, "[t]he aggravation of the underlying involvement is in relationship to her reported April 2009 vocationally related event."⁵ Dr. Pratt, utilizing the *Guides*,⁶ indicated claimant had "DRE category II involvement or 5% impairment of the whole person."⁷ He gave claimant restrictions of not performing frequent low back bending

⁴ R.M.H. Trans., Cl. Ex. 2 at 8.

⁵ Pratt IME Report (March 15, 2011) at 3.

⁶ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

⁷ Pratt IME Report (March 15, 2011) at 4.

or twisting; lifting no more than 25 pounds occasionally; and pushing and pulling no more than 50 pounds.

On August 24, 2011, the parties stipulated that pursuant to K.S.A. 44-510e, Dr. Pratt's opinion would be that due to claimant's injury her task loss would be 25.7% using the task analysis report of Steve Benjamin and 22% if the task performance capacity assessments of Jerry Hardin are utilized. The parties further stipulated that the foregoing opinion of Dr. Pratt would be admitted into evidence.

At the request of claimant's counsel, Dr. Michael H. Munhall, a physical medicine and rehabilitation physician, examined claimant in May 2010. His impression was lumbar spine syndrome, low back, left leg pain and myofascial pain in the left lower quadrant. Dr. Munhall opined that within a reasonable degree of medical probability and based upon his education, training and experience, there was a causal connection between claimant's April 13, 2009, injury and her employment with respondent. Using the *Guides*, he assigned claimant a 5% permanent impairment to the body as a whole for residual low back and left leg pain. He also indicated claimant had a 10% permanent impairment to the left lower extremity as a result of left lower quadrant myofascial pain trigger point spasms, which converts to a 4% whole body impairment. Using the Combined Values Chart of the *Guides*, he determined claimant had a 9% whole body permanent impairment of function. He testified that his impairment rating was based on objective findings, not claimant's subjective pain complaints.

For claimant's injury, Dr. Munhall assigned restrictions of no static or repetitive trunk rotation; no static or repetitive lifting, carrying, pushing or pulling below waist level; lifting or carrying no more than 20 pounds; pushing or pulling no more than 20 pounds at waist level; and only occasional unloaded lifting, loaded bending, squatting and stooping. Based upon Mr. Hardin's task performance capacity assessments, Dr. Munhall opined claimant could no longer perform 8 of 37 job tasks for a 22% task loss. He did acknowledge that if claimant adhered to his restrictions, she was capable of engaging in substantial gainful employment. Dr. Munhall testified that claimant's subjective complaints are compatible with the objective findings. He indicated there was no evidence of symptom magnification.

Claimant was treated by Dr. Amitabh Goel, a physical medicine and rehabilitation specialist, from June 17, 2009 through September 15, 2009. The report from Dr. Goel's June 17, 2009, examination of claimant lists his impressions as:

1. Low back syndrome, lumbar sprain/strain, date of injury 04/13/2009, although she clinically seems to have some early discogenic low back pain and early left lower extremity radicular symptoms.
2. Lumbar spondylosis and facet joint syndrome.⁸

⁸ Goel Depo., Ex. 2.

Dr. Goel gave claimant a series of epidural and facet injections. He determined claimant reached maximum medical improvement on September 15, 2009, and returned her to work without restrictions. An October 2009 letter to respondent's insurance carrier signed by Dr. Goel and his physician assistant, Tammy S. Munyon, stated that, "Dr. Goel has reviewed the patient's records and MRI and feels that she has degenerative changes that were exacerbated by her Workmen's Comp injury."⁹ He opined that pursuant to the *Guides*, claimant had no permanent partial disability as a result of the injury. He testified that claimant's work-related injury did not cause her to lose any ability to perform work tasks.

Dr. Goel testified at length as to why he opined claimant had no permanent partial disability as a result of her April 13, 2009, injuries. He indicated the *Guides* requires clinical evidence of loss of muscle or loss of reflexes, which claimant did not exhibit. Dr. Goel went on to say there also must be radiological evidence of abnormality, which was not present. He also testified:

There was no impairment on the MRI. If there is a lesion, I can give her restrictions. If there is no lesion, I cannot give her restrictions. . . .¹⁰

. . . .

We keep on harping back on the same thing. For us to say there's a permanent impairment, there has to be a reason for a permanent impairment, and in her case there isn't one on the physical exam, on her MRI.¹¹

Dr. Goel acknowledged that other physical medicine specialists might have different opinions than his. He also testified that claimant had a lumbar sprain/strain, but there was no evidence she would need treatment on a long-term basis.

At the review and modification hearing, claimant testified that she has pain from the low back, down her hip into the left leg. Her left leg has numbness, achiness and almost locking. Claimant is on prescription medicine for her condition, but did not remember the name. She had not worked since being discharged by respondent and was receiving unemployment benefits.

In his November 22, 2011, review and modification Award, ALJ Clark determined claimant was entitled to a modification of her August 9, 2010, settlement. The ALJ found claimant was entitled to a 62% work disability. He averaged the task loss opinions of

⁹ *Id.*

¹⁰ *Id.*, at 26.

¹¹ *Id.*, at 27.

Dr. Pratt (22% if Jerry Hardin's task analysis report is used and 25.7% if Steve Benjamin's task analysis report is used) for a 24% task loss. ALJ Clark determined claimant suffered a 100% wage loss effective September 20, 2010, which is the day after claimant was laid off from respondent's employ.

PRINCIPLES OF LAW

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.¹²

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.¹³

K.S.A. 44-528(a) and (d) state:

(a) Any award or modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, whether the award provides for compensation into the future or whether it does not, may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. In connection with such review, the administrative law judge may appoint one or two health care providers to examine the employee and report to the administrative law judge. The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a prior award, upon such terms as may be just, by increasing or diminishing the compensation subject to the limitations provided in the workers compensation act.

. . . .

(d) Any modification of an award under this section on the basis that the functional impairment or work disability of the employee has increased or diminished shall be effective as of the date that the increase or diminishment actually occurred, except that in no event shall the effective date of any such modification be more than six months prior to the date the application was made for review and modification under this section.

¹² K.S.A. 2008 Supp. 44-501 and K.S.A. 2008 Supp. 44-508(g).

¹³ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

K.S.A. 44-510e(a) states in pertinent part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

In *Serratos*,¹⁴ the Kansas Court of Appeals held:

In this case, K.S.A. 44-528(a) and (b) must be considered together. *Bergstrom*'s admonishment to follow the plain language of a statute cannot be read so narrowly that other subsections of a statute are ignored. Additionally, application of subsection (b) in this case is not as clear as Cessna would suggest.

....

The Board found K.S.A. 44-510e controlled in this matter over the general language of K.S.A. 44-528 and reflected the legislature's most recent expression of its intent on how permanent partial general disability awards should be calculated. This is essentially correct if referring to subsection (b). K.S.A. 44-528(a) sets out the terms to modify a prior award according to the "limitations provided" in the Act. The only way to calculate a change in work disability is by referring to K.S.A. 44-510e(a). Following *Bergstrom*, the Board found *Serratos*' post-injury wage loss was 100%, and the reasons for *Serratos*' wage loss were irrelevant. The Board did not err in applying K.S.A. 44-510e(a) to find *Serratos*' work disability increased, and a modification was justified.

¹⁴ *Serratos v. Cessna Aircraft Company*, 2011 WL 2637449, Kansas Court of Appeals unpublished opinion filed July 1, 2011 (No. 104,106).

ANALYSIS

In *Serratos*, the Kansas Court of Appeals ruled that an employee may seek a review and modification when the only basis for the modification was job loss and resulting wage loss. K.S.A. 44-528 sets out the terms to modify a prior award. The Court in *Serratos* held the only way to calculate a work disability is by following K.S.A. 44-510e. The Court in *Serratos* concluded that the language of K.S.A. 44-510e controlled over the general language of K.S.A. 44-528. Here, as in *Serratos*, claimant sought a review and modification because she lost her job. In *Serratos*, claimant was discharged from his employment due to alleged misconduct not due to the injury. In the present claim, claimant was discharged because her job was eliminated by respondent, not as the result of misconduct or through her own fault. Either way, the reason for the wage loss is irrelevant. The Board finds that K.S.A. 44-528 permits claimant to seek a review and modification as claimant has suffered a job loss and resulting wage loss.

Respondent asserts claimant failed to prove by a preponderance of the evidence that she sustained a permanent partial impairment. Respondent relies primarily on the opinion of Dr. Goel to arrive at this conclusion. Dr. Goel is of the opinion that an injured worker cannot have a permanent partial impairment where there is no clinical evidence of loss of muscle or loss of reflexes. He opined that because there was no radiographic evidence of abnormality nor any evidence of injury revealed by claimant's MRI that she had no permanent impairment. Yet he gave claimant a series of epidural and facet injections for low back pain. Dr. Goel acknowledged that other physical medicine specialists might have different opinions than his.

Both Drs. Munhall and Pratt determined claimant had a permanent impairment to the body as a whole. Dr. Pratt opined claimant aggravated her low back condition in her April 2009 work-related accident. Dr. Munhall opined that within a reasonable degree of medical probability and based upon his education, training and experience, there was a causal connection between claimant's April 13, 2009, injury and her employment with respondent. They both assigned claimant permanent restrictions. On the issue of whether claimant suffered a permanent partial impairment, the Board finds the opinions of Drs. Pratt and Munhall more persuasive than the opinions of Dr. Goel. Radiographic and other tests do not detect all injuries. Dr. Goel's viewpoint that a patient cannot have a permanent impairment unless a radiographic test or MRI reveals an abnormality is unconvincing. The Board finds that claimant met her burden of proof that she suffered a permanent partial impairment which resulted in permanent restrictions.

After her injury on April 13, 2009, claimant returned to her job, where she performed her pre-injury job tasks without restrictions. Respondent argues this means claimant is capable of earning the same wages as she was on the date of her injury. This argument ignores the language of K.S.A. 44-510e which states, "the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage

the worker is earning after the injury.” At the time claimant filed her Application for Review and Modification she was unemployed and had a 100% wage loss, which is a change in circumstances.

Drs. Pratt and Munhall opined claimant suffered a 22% task loss based upon Jerry Hardin’s task performance capacity evaluation. Dr. Pratt opined that, based upon Steve Benjamin’s task analysis report, claimant had a 25.7% task loss. The ALJ gave equal weight to the two task loss opinions of Dr. Pratt and found that claimant had a 24% task loss. The thrust of respondent’s argument is that claimant suffered no task loss because Dr. Goel testified that claimant had no restrictions and the work-related injury did not cause her to lose any ability to perform work tasks. Respondent also points to the fact that claimant returned to her old job duties after the accident.

As stated above, the Board finds the opinions of Drs. Pratt and Munhall more persuasive than that of Dr. Goel. The Board, like the ALJ, gives equal weight to the two task loss opinions of Dr. Pratt and finds claimant sustained a 24% task loss. Accordingly, the Board finds claimant has a work disability of 62%.

CONCLUSION

1. K.S.A. 44-528 does not bar claimant from seeking a review and modification.
2. Claimant proved by a preponderance of the evidence that she sustained a permanent partial impairment.
3. Claimant suffered a task loss of 24% and a wage loss of 100%, for a resulting work disability of 62%.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.¹⁵ Accordingly, the findings and conclusions set forth above reflect the majority’s decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board affirms the November 22, 2011, review and modification Award entered by ALJ Clark.

IT IS SO ORDERED.

¹⁵ K.S.A. 2011 Supp. 44-555c(k).

Dated this ____ day of April, 2012.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Garry L. Howard, Attorney for Claimant
William L. Townsley, III, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge